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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TARRELL BOYD, Defendant and Appellant.	D076920 (Super. Ct. No. JCF35535)

APPEAL from an order after judgment of the Superior Court of Imperial County, Christopher J. Plourd, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Terrell Boyd pleaded no contest in 2016 to possession of cannabis[1] in a correctional facility, in violation of Penal Code section 4573.6. He contends this act is no longer a felony under Health and Safety Code[2] section 11362.1, subdivision (a), which was enacted pursuant to the passage of Proposition 64 and which decriminalized possession of less than 28.5 grams—about an ounce—of cannabis. (Prop. 64, § 4.4, approved Nov. 8, 2016, eff. Nov. 9, 2016; amended by Stats. 2017, ch. 27, § 129.) We disagree, in accordance with our opinion in *People v. Whalum* (2020) 50 Cal.App.5th 1, review granted, August 12, 2020, S262935 (*Whalum*). We therefore affirm the order after judgment.

BACKGROUND

Procedure

Defendant Terrell Boyd pleaded no contest in 2016 to possession of cannabis in a correctional facility, in violation of Penal Code section 4573.6. He stipulated that the grand jury transcript provided a factual basis for the plea. The court sentenced him to the lower term of two years, consecutive to the term that he was already serving.

On July 23, 2019, defendant filed a petition for recall of sentence and dismissal of judgment pursuant to section 11361.8, subdivision (b). After considering the pleadings and oral argument, the court issued a statement of decision denying the petition. The court noted that there were two published cases that reached different conclusions: *People v. Perry* (2019) 32

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1 In 2017, the Legislature replaced references to "marijuana" in the Health and Safety Code with the term "cannabis." (See, e.g., Stats. 2017, ch. 27, § 121, eff. June 27, 2017.) For consistency, we use the amended terminology of "cannabis" throughout this opinion.

2 Further statutory references are to the Health and Safety Code unless otherwise specified.

Cal.App.5th 885, 888 (*Perry*), and *People v. Raybon* (2019) 36 Cal.App.5th 111, 114, review granted, August 21, 2019, S256978 (*Raybon*). It followed *Perry*, and concluded that possession of cannabis on prison grounds was not changed by Proposition 64. The court denied the petition to dismiss defendant's judgment.

Defendant timely appealed.

Facts

Defendant was a prisoner at Calipatria State Prison. A correctional officer conducted a search of his cell on July 29, 2013. Defendant was the sole occupant. The officer found 36 small individual piles of cannabis in between some books, and put it all in a baggie. The cannabis and baggie weighed 18.3 grams. This was a large amount for a correctional facility, as inmates use very small amounts of cannabis. Another officer took inventory of all of defendant's personal possessions. He found another 11 or 12 bindles of cannabis in the middle of two bowls stacked together. One bindle weighed 10.2 grams and the others each weighed between .3 and .4 grams.

DISCUSSION

Failure to Prove Eligibility

Possession of more than 28.5 grams of cannabis remains illegal in all circumstances. (§ 11357, subd. (b).) Defendant had the burden of proving each fact essential to his claim. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.) He has not made that showing. Evidence at the grand jury, to which defendant stipulated, showed the cannabis totaled about 31.5 to 32.9[3]

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[3] Defendant had the 36 piles of cannabis that, together with a baggie, weighed 18.3 grams. He also had one large bindle weighing 10.2 grams, and 10 to 11 small bindles, each weighing between .3 and .4, for an additional amount between 3.0 grams [10 bindles at .3 grams each] and 4.4 grams [11 bindles at .4 grams each].

grams, apparently including packaging. The amount of cannabis without packaging may well be less than 28.5 grams, but defendant has not carried his burden of proving the total weight of the cannabis he possessed was less than 28.5 grams. His petition was deficient on that ground. (*Ibid.*) In any event, we agree with the cases that have found Proposition 64 not applicable to possession of less than 28.5 grams of cannabis in prison.

Possession of Less than 28.5 Grams of Cannabis in Prison Remains Unlawful After Proposition 64

Appellate courts have split on the question of Proposition 64's effect on criminal laws prohibiting the possession of cannabis in a correctional institution. The issue is currently pending before our Supreme Court in *Raybon* and *Whalum*. The Third District in *Raybon* concluded that possession of less than 28.5 grams of cannabis in prison is no longer unlawful, due to Proposition 64. (*Raybon*, *supra*, 36 Cal.App.5th at pp. 113, 121, review granted.) The First District, Sixth District, and our court have all reached the opposite conclusion. (*Perry*, *supra*, 32 Cal.App.5th at pp. 891–893 [First Dist.]; *People v. Herrera* (2020) 52 Cal.App.5th 982, 991–992, review granted Oct. 14, 2020, S264339 (*Herrera*) [Sixth District]; *Whalum,*[4] *supra*, 50 Cal.App.5th at pp. 12–13, review granted [Fourth District].) We

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4 The defendant in *Whalum* was convicted of Penal Code section 4573.8, which criminalizes possession of all drugs, drug paraphernalia, and alcohol in custodial settings. (Pen. Code, § 4573.8; *Whalum*, *supra*, 50 Cal.App.5th at p. 4, review granted.) Defendant here was convicted of Penal Code section 4573.6, which prohibits possession of controlled substances in custody. Both statutes have been used to prosecute prisoners who possess cannabis, because it is both a drug and a controlled substance regulated in Division 10 of the Health and Safety Code (§§ 11007, 11054, subd. (d)(13), 11357). We find the reasoning in *Whalum* to be applicable here, although it involves a slightly different statute.

agree with the reasoning in the latter cases that possession of cannabis in prison is still unlawful.

Possession and use of cannabis were decriminalized in section 11362.1, which provides in part: "Subject to Section[] . . . 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to: [¶] (1) Possess . . . not more than 28.5 grams of cannabis not in the form of concentrated cannabis; [¶] . . . [¶] (4) Smoke or ingest cannabis or cannabis products." (§ 11362.1, subd. (a).) Decriminalization has a carve-out exception, stated in section 11362.45. As relevant here, "Section 11362.1 does not amend, repeal, affect, restrict, or preempt: [¶] . . . [¶] (d) *Laws pertaining to smoking or ingesting cannabis* or cannabis products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation . . . ." (§ 11362.45, emphasis added.)

The issue, thus, is that section 11362.45 refers only to laws criminalizing the "smoking or ingesting [of] cannabis" in prison, and does not reference possession of cannabis in prison. The *Perry* court, the first to address this issue, observed that the phrase " 'pertaining to' " as used in section 11362.45, subdivision (d) has "wide reach." (*Perry*, *supra*, 32 Cal.App.5th at pp. 890–891.) The court acknowledged that possession was "not necessarily an inherent aspect of smoking or ingesting [cannabis]," but observed that possessing cannabis was certainly "*related*" to smoking or ingesting it, and found that "possession must 'pertain' to smoking or ingesting." (*Id*. at p. 892.) The court concluded that Proposition 64, which decriminalized possession of small amounts of cannabis (§ 11362.1, subd. (a)) but did not affect "[l]aws pertaining to smoking or ingesting cannabis" in

prison (§ 11362.45, subd. (d)), did not modify or repeal Penal Code section 4573.6's prohibition against the possession of cannabis in prison. (*Perry*, at pp. 890–893.)

In *Whalum*, we expressly agreed with the *Perry* court's analysis and added that "even though Penal Code section 4573.8 criminalizes *possession* rather than *use* of drugs in a correctional institution, it is nevertheless properly described as a law 'pertaining to smoking or ingesting cannabis' in such a setting, as it is part of prophylactic approach to prevent prisoners from *using* drugs." (*Whalum*, *supra*, 50 Cal.App.5th at pp. 10, 12, review granted.) We also examined the intent of the voters as expressed in the election materials and determined that the voters did not intend to change the laws prohibiting possession of cannabis in correctional institutions. (*Id.* at p. 15.) The *Herrera* court also adopted the view that Proposition 64 did not amend, repeal or preempt Penal Code section 4573.6's criminal prohibition of possession of cannabis in prison. (*Herrera*, *supra*, 52 Cal.App.5th at pp. 991–992, review granted.)

On the other hand, the *Raybon* court concluded, and defendant urges, that the plain language of section 11362.1 compels a finding that "possession of less than an ounce of cannabis in prison is no longer a felony." (*Raybon*, *supra*, 36 Cal.App.5th at p. 113, review granted.) Regarding the scope of the carve-out in section 11362.45, subdivision (d), the *Raybon* court rejected the notion that the "drafters of Proposition 64 intended to include possession not by naming it, but by the use of a tangential reference 'pertaining to.' " (*Raybon,* at p. 121.) The court further explained, "it stretches the imagination to conclude that the drafters listed two distinct activities, 'smoking or ingesting,' intending to include a third distinct activity, possession, by using the vague reference 'pertaining to.' " (*Ibid.*) The court

reasoned that "rules prohibiting the possession of cannabis [in prison] can be established and managed administratively." (*Id.* at p. 119.) The *Raybon* court's conclusion would seem particularly inapt here, where defendant likely possessed the cannabis for sale to other inmates, based on the division into small amounts and the packaging in bindles. Prisoners would be prohibited from smoking or ingesting cannabis, but defendant would not be prohibited from distributing or selling cannabis to other prisoners for their use.

We continue to adhere to our opinion in *Whalum*, *supra*, 50 Cal.App.5th at page 15, review granted, that defendant is not eligible for relief under Proposition 64 for his crime of possessing cannabis in prison. (See also *Perry*, *supra*, 32 Cal.App.5th at pp. 891–893; *Herrera*, *supra*, 52 Cal.App.5th at pp. 991–992, review granted.)

DISPOSITION

The order after judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

GUERRERO, J.